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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHADY TREE FARMS,

Plaintiff and Appellant,

v.

CITY OF FRESNO,

Defendant and Respondent.

F062314

(Super. Ct. No. 09CECG01170)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Gilmore, Wood, Vinnard & Magness, David M. Gilmore and Jennier J. Panicker for Plaintiff and Appellant.

Law Offices of Michael J. Lampe and Michael P. Smith for Defendant and Respondent.

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Appellant, Shady Tree Farms, LLC (Shady Tree), delivered mature trees for the landscaping of a development known as Granite Park. When Shady Tree did not receive payment, Shady Tree recorded a materialman's lien.

In this appeal, Shady Tree challenges the summary judgment entered in favor of respondent, the City of Fresno (City), on Shady Tree's complaint to foreclose on its materialman's lien. Shady Tree argues the trial court erred in finding that: (1) Shady Tree's failure to serve a preliminary 20-day notice under Civil Code[1] section 3097 prevented it from foreclosing on the lien; and (2) Shady Tree's materialman's lien for site improvements was subordinate to the deed of trust securing financing for Granite Park.

The trial court correctly granted the City's motion for summary judgment. Accordingly, the judgment will be affirmed.

BACKGROUND

The Granite Park development covered several acres of property and was to be filled with a sports complex, restaurants and entertainment for all ages. In 2005, the City, Bank of the West (Bank), and the entities developing Granite Park, the Zone Sports Center, LLC (Zone) and Granite Park Kids' Foundation (Foundation), entered into a series of agreements.

In February 2005, the Bank and the Foundation executed a credit agreement in which the Bank agreed to loan the Foundation $5.2 million to refinance existing debt incurred by the Zone with another lender. The Bank was also granted a security interest in a $500,000 debt service reserve account that was to be exclusively used for the payment of principal and interest on the loan. This loan was secured by a "non-construction" deed of trust, recorded March 7, 2005, giving the Bank a first deed of trust in the property known as the sports fields.

On March 4, 2005, the City, the Zone and the Foundation entered into the "Economic Development Agreement" (Economic Development Agreement). The parties agreed that: the Zone would convey the sports fields to the Foundation; the Foundation

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[1] All further statutory references are to the Civil Code.

would borrow $5.2 million from the Bank to "repay the interim construction financing used to complete the Sports Fields, to satisfy monetary liens and claims recorded against the Sports Fields, to establish a debt service reserve account, and to further improve the Sports Fields including, without limitation, to complete the Children's Play Area"; and the City would enter the "Contingent Debt Purchase Agreement" (Contingent Debt Purchase Agreement) with the Bank. Under the Contingent Debt Purchase Agreement the City agreed to purchase the Bank's loan and take an assignment of the Bank's deed of trust in the event the Foundation defaulted on the loan. Also on March 4, 2005, the loan funds were paid into an escrow. From that escrow approximately $4.6 million was released to pay off the prior construction debt and $500,000 was released into the debt service reserve account.

Shady Tree is in the business of growing and selling mature trees for landscaping. On August 11, 2008, Shady Tree entered into a contract with JEG Ventures, LLC (JEG) to sell trees to the owners of Granite Park. Shady Tree agreed to deliver 1,879 trees for a price of approximately $3.2 million.

Between August 12, 2008 and November 10, 2008, Shady Tree delivered 959 trees to the Granite Park development. A landscaping company immediately planted 47 of these trees and the remaining trees were placed around the development for planting at a later date. The Granite Park entities assumed ownership and responsibility for the trees but failed to care for them. Eventually, all of the trees died.

Except for a $25,000 deposit, Shady Tree was not paid for the trees. On February 3, 2009, Shady Tree recorded a materialman's lien against JEG, the Zone and the Foundation seeking to recover the balance due of $1,959,244.50 plus interest from September 1, 2008.

On April 2, 2009, Shady Tree filed the underlying action to enforce its materialman's lien. Shady Tree further requested a declaration that its materialman's lien had priority over the Bank's mortgage lien and the City's guarantee.

The Foundation defaulted on its loan from the Bank and the Bank demanded that the City honor its guarantee. The City did so and the Bank assigned its deed of trust to the City in December 2009. The City foreclosed on the property in March 2010 and currently holds title to the property under a trustee's deed.

The Bank and the City moved for summary judgment and the motion was granted. Thereafter, the trial court expunged Shady Tree's materialman's lien. Because the Bank no longer has any interest in this action, Shady Tree's appeal is as to the City only.

DISCUSSION

1. *Standard of review.*

A party moving for summary judgment bears the burden of persuading the trial court that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525 (*Brown*).) Once the moving party meets this initial burden, the burden shifts to the opposing party to establish, through competent and admissible evidence, that a triable issue of material fact still remains. If the moving party establishes the right to the entry of judgment as a matter of law, summary judgment will be granted. (*Ibid*.)

On appeal, the reviewing court must assume the role of the trial court and reassess the merits of the motion. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) Accordingly, review is limited to the facts shown in the supporting and opposing affidavits and those admitted and uncontested in the pleadings. (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 502.) The appellate court applies the same legal standard as the trial court to determine whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law. The court

must determine whether the moving party's showing satisfies his or her burden of proof and justifies a judgment in the moving party's favor. (*Brown, supra,* 171 Cal.App.4th at p. 526.) In doing so, the appellate court must view the evidence and the reasonable inferences therefrom in the light most favorable to the party opposing the summary judgment motion. (*Essex Ins. Co. v. Heck* (2010) 186 Cal.App.4th 1513, 1522.)

2. *Shady Tree was required to serve a preliminary 20-day notice on the lender.*

A mechanic's lien is a claim against the real property upon which the claimant has bestowed labor or furnished materials. (*Kim v. JF Enterprises* (1996) 42 Cal.App.4th 849, 854 (*Kim*).) A mechanic's lien is perfected by filing a claim of lien within certain time limitations and by meeting other statutory requirements. (*Ibid*.) One such statutory requirement is the service of a preliminary 20-day notice. (§ 3097.)

The mechanics' lien law is mandated by the California Constitution. (*Connolly Development, Inc. v. Superior Court* (1976) 17 Cal.3d 803, 808.) Due to this unique constitutional command, "the courts have uniformly classified the mechanics' lien laws as remedial legislation, to be liberally construed for the protection of laborers and materialmen." (*Id*. at pp. 826-827, fn. omitted.) Nevertheless, this liberal construction rule may not be applied to frustrate the Legislature's manifested intent to exact strict compliance with the preliminary notice requirement. (*Harold L. James, Inc. v. Five Points Ranch, Inc.* (1984) 158 Cal.App.3d 1, 5.) The Legislature " 'imposed the notice requirements for the concurrently valid purpose of alerting owners and lenders to the fact that the property or funds involved might be subject to claims arising from contracts to which they were not parties and would otherwise have no knowledge.' " (*Ibid.*)

A mechanic's lien itself is not recorded until after the completion of the work in question. (§§ 3115, 3116; *Kim, supra,* 42 Cal.App.4th at p. 855.) However, with certain exceptions, a claimant must serve a preliminary 20-day notice "not later than 20 days after the claimant has first furnished labor, service, equipment, or materials to the

jobsite." (§ 3097, subd. (d).) If a preliminary 20-day notice is required, a claimant shall be entitled to enforce a lien only if that preliminary 20-day notice has been given. (§ 3114.)

It is undisputed that Shady Tree did not serve a preliminary 20-day notice on the Bank. Shady Tree argues that it was not required to do so under section 3097 because it was under direct contract with the owner.

Section 3097 provides, in relevant part:

> "'Preliminary 20-day notice (private work)' means a written notice from a claimant that is given prior to the recording of a mechanic's lien … and is required to be given under the following circumstances:
>
> "(a) Except one under direct contract with the owner …, every person who furnishes labor, service, equipment, or material for which a lien … otherwise can be claimed under this title …, shall, as a necessary prerequisite to the validity of any claim of lien, … cause to be given to the owner or reputed owner, to the original contractor, or reputed contractor, and to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section.
>
> "(b) Except the contractor, … all persons who have a direct contract with the owner and who furnish labor, service, equipment, or material for which a lien … otherwise can be claimed under this title, … shall, as a necessary prerequisite to the validity of any claim of lien, … cause to be given to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice as prescribed by this section."

Shady Tree is correct that it was not required to give the Bank a preliminary 20-day notice under section 3097, subdivision (a). The record supports Shady Tree's position that it was under direct contract with the owner of Granite Park and thus it was not required to give notice to the owner, original contractor, or lender under that subdivision. However, having had a direct contract with the owner and having furnished materials, Shady Tree falls within the category of persons required to give a preliminary notice to the construction lender under section 3097, subdivision (b).

Shady Tree disagrees with this interpretation of section 3097, subdivision (b). Rather, Shady Tree posits that section 3097, subdivision (b) should be read as an alternative to section 3097, subdivision (a), and thus, if either section is met, a party is exempt from giving the 20-day preliminary notice. Alternatively, Shady Tree argues that having a direct contract with the owner exempts it from giving notice to anyone. In other words, having had a direct contract with Granite Park to provide trees makes Shady Tree a contractor within the meaning of section 3097, subdivision (b).

In construing section 3097, we begin with its plain language, affording the words their ordinary and usual meaning. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 251.) At the same time, we must give meaning to every word of the statute, if possible, and avoid a construction that makes any word surplusage. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118.) Although, as remedial legislation, mechanic's lien laws are to be liberally construed for the protection of laborers and materialmen, we nevertheless must apply common sense to the language at issue and interpret the statute to make it workable and reasonable. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1122.)

"As has been noted, '[t]he Mechanic's Lien Law often is inartfully drawn and leaves much room for doubt ….'" (*Kodiak Industries, Inc. v. Ellis* (1986) 185 Cal.App.3d 75, 82, fn. 3 (*Kodiak Industries*).) Subdivisions (a) and (b) fall into this "inartfully drawn" category. Nevertheless, we must interpret section 3097 in such a way as to avoid making either subdivision "surplusage."

If we were to adopt Shady Tree's position and find that if a materialman is excepted under *either* subdivision (a) or (b), that materialman is not required to give a preliminary 20-day notice as a prerequisite to foreclosing on its lien, all of section 3097, subdivision (b), would be surplusage. The persons who have a direct contract with the owner and who furnish labor, service, equipment, or material would never be required to

give a preliminary 20-day notice to the construction lender or reputed construction lender as is required under section 3097, subdivision (b), because they would always be exempt under section 3097, subdivision (a).

Contrary to Shady Tree's argument, the interpretation that requires a materialman to meet the requirements under both subdivisions to be exempt does not render section 3097, subdivision (a), superfluous. Subdivision (b) pertains to the construction lender or reputed construction lender only, whereas subdivision (a) pertains to the owner or reputed owner, original contractor or reputed contractor, and the construction lender or reputed construction lender. While there is some overlap regarding the construction lender, applying both subdivisions to one materialman does not cause either subdivision to be entirely surplusage.

Additionally, the ordinary and usual meaning of the words used in section 3097 supports requiring that both subdivisions be met. Section 3097 states that a preliminary 20-day notice "is required to be given *under the following circumstances.*" (Italics added.) The plain meaning of the phrase "under the following circumstances" is that all of the following circumstances apply, as opposed to *one of the following circumstances* or *any of the following circumstances*.

Shady Tree's alternative construction, i.e., that as a person who has a direct contract with the owner it is a "contractor" under section 3097, subdivision (b), is also untenable. Subdivision (b) requires that "all persons who have a direct contract with the owner," *except the contractor*, must give a 20-day preliminary notice to the construction lender or reputed construction lender. If every person who had "a direct contract with the owner" also qualified as "the contractor," section 3097, subdivision (b), would be meaningless. The exception for the contractor would subsume the category of persons who were required to give a preliminary 20-day notice to the construction lender. Thus, subdivision (b) would never come into effect.

Further, section 3097, subdivision (b), refers to *the* contractor rather than *a* contractor. The use of "the" indicates a single person, i.e., the prime or general contractor for the project, not multiple contractors, i.e., the subcontractors or others with direct contracts with the owner.

Other courts that have had occasion to analyze the term "contractor" as used in section 3097, subdivision (b), have concluded that "the contractor" refers to the general or prime contractor. In *Kodiak Industries*, the court noted that the exception of "the contractor" in section 3097, subdivision (b), was "puzzling" but that it presumably referred to someone other than "'all persons who have a direct contract with the owner.'" (*Kodiak Industries, supra,* 185 Cal.App.3d at p. 82, fn. 3.) Although undefined, contractor in this context "has sensibly been construed to mean the general or prime contractor for the entire project." (*Ibid*.) Similarly, the court in *Westfour Corp. v. California First Bank* (1992) 3 Cal.App.4th 1554, 1561, adopted this construction of "the contractor" in section 3097, subdivision (b). The court summarized section 3097 as requiring "all persons other than a person who is both 'under direct contract with the owner' and 'the contractor' to give preliminary notice to a construction lender within 20 days after commencing work on a project. The term 'the contractor' in section 3097 has been interpreted to mean 'the general or prime contractor for the entire project.'" (*Westfour Corp, supra,* at p. 1561.)

In sum, construing section 3097, subdivisions (a) and (b), so as to give the words their ordinary and usual meaning and to avoid surplusage, we conclude that Shady Tree was required to give the Bank a preliminary 20-day notice. Subdivisions (a) and (b) are not alternatives. If either one is met the 20-day notice must be given. Further, persons who have a direct contract with the owner are not "the contractor" under section 3097, subdivision (b), based solely on that relationship.

It is undisputed that Shady Tree did not give the Bank the preliminary 20-day notice as it was required to do under section 3097. Thus, Shady Tree cannot enforce its materialman's lien against the Bank or its successor in interest, the City. Accordingly, the trial court correctly granted the City's summary judgment motion. The City was entitled to judgment as a matter of law.

3. *Civil Code section 3137.*

As an alternative ground for granting the summary judgment motion, the court found that the Bank had priority over Shady Tree's mechanic's lien because the Bank recorded its deed of trust before Shady Tree began the site improvements. Shady Tree contends that this finding was in error.

Shady Tree acknowledges that, in general, deeds of trust recorded before commencement of any work of improvement have priority over mechanic's liens. (*Schmitt v. Tri Counties Bank* (1999) 70 Cal.App.4th 1234, 1240.) However, Shady Tree contends that its lien falls within the statutory exception under section 3137 that grants priority to a lien for site improvements when the earlier recorded deed of trust "was given for the sole or primary purpose of financing such site improvements." Shady Tree relies on the provision in the Economic Development Agreement that the loan from the Bank would be used to "repay the interim construction financing used to complete the Sports Fields, to satisfy monetary liens and claims recorded against the Sports Fields, to establish a debt service reserve account, and to further improve the Sports Fields including, without limitation, to complete the Children's Play Area." According to Shady Tree, the phrase "to further improve the Sports Fields" demonstrates that site improvements were a primary purpose of the loan.

Nevertheless, as noted by the trial court, even if there were a factual dispute on this issue, Shady Tree's failure to give the required preliminary 20-day notice to the Bank

is dispositive. Accordingly, there is no need to determine whether Shady Tree's materialman's lien had priority over the Bank's deed of trust.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to the City.

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LEVY, Acting P.J.

WE CONCUR:

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GOMES, J.

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DETJEN, J.